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In the Supreme Court of the United States

OCTOBER TERM, A.D. 1972.

72-187

SQUARE D COMPANY,

Petitioner,

vs.

JAMES D. HODGSON, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

PAGE

Opinions 2

Jurisdiction 2

Questions Presented for Review 2

Statutes Involved 3

Statement of the Case 5

Nature of the Case 5

Facts 6

Argument 13

Conclusion 19

Appendix A

Opinion of the United States District Court for the Eastern District of Kentucky Dated October 7, 1970 ..... App. 1

Appendix B

Opinion of the United States Court of Appeals for the Sixth Circuit Dated May 9, 1972 ..... App. 14

TABLE OF CITATIONS

Cases

PAGE

Hodgson v. Brookhaven General Hospital, 436 F.2d 719 (5th Cir. 1970) 14, 15

Hodgson v. Fairmont Supply Co., 64 CCH Labor Cases ¶32,436 (N. D. W. Va. 1970) 13

Hodgson v. Golden Isle Nursing Home, Inc., 64 CCH Labor Cases ¶32,445 (S.D. Fla. 1971) 13

Hodgson v. Square D Company, 3 EPD ¶8016 (E.D. Ky. 1970) 2

Hodgson v. Square D Company, 4 EPD ¶7803 (6th Cir. 1972) 2

Shultz v. Kentucky Baptist Hospital, 62 CCH Labor Cases ¶32,296 (W.D. Ky. 1969) 13

Shultz v. Kimberly-Clark Corporation, 315 F. Supp. 1323 (W. D. Tenn. 1970) 13

Shultz v. Saxonburg Ceramics, Inc., 314 F. Supp. 1139 (W. D. Penn. 1970) 18

Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir.) *cert. denied,* 398 U.S. 905 (1970) 14, 15

Wirtz v. Citizens First National Bank, 58 CCH Labor Cases ¶32,050 (E. D. Texas 1968) 14

Wirtz v. Dennison Manufacturing Company, 265 F. Supp. 787 (D. Mass. 1967) 13

Wirtz v. Koller Craft Plastic Products, Inc., 296 F. Supp. 1195 (E. D. Mo. 1968) 18

Wirtz v. Multi-Products, Inc., 59 CCH Labor Cases ¶32,124 (N. D. Ill. 1968) 14

Wirtz v. Muskogee Jones Store Company, 293 F.Supp. 1034 (E.D. Okla. 1968) 14

PAGE

Congressional Record

109 Cong. Rec. 9198 17

Statutes

Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. §206(d) ..3, 4, 5, 13

Fair Labor Standards Act of 1938, 52 Stat. 1060, Section 6(d), 29 U.S.C. §206(d) 3, 4, 13

Fair Labor Standards Act of 1938, 52 Stat. 1060, Section 17, 29 U.S.C. §217 5

Portal-to-Portal Act of 1947, as amended, 61 Stat. 84, Section 6, 29 U.S.C. §255 5

Portal-to-Portal Act of 1947, as amended, 61 Stat. 84, Section 10, 29 U.S.C. §259 .....3, 4, 5, 18

U. S. Code

28 U.S.C. §1254(1) 2

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NO.

SQUARE D COMPANY,

Petitioner,

VS.

JAMES D. HODGSON, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioner, Square D Company, respectfully petitions this Honorable Court for a Writ of Certiorari to review an opinion and decree of the United States Court of Appeals for the Sixth Circuit.

Petitioner respectfully shows:

OPINIONS

The opinion of the District Court is not officially reported; it is unofficially reported as follows: *Hodgson* v. *Square D Company,* 3 EPD ¶8016 (E.D. Ky. 1970). Such opinion is appended hereto as Appendix A.

The opinion of the Court of Appeals is not yet officially reported; it is unofficially reported as follows: *Hodgson* v. *Square D Company,* 4 EPD ¶7803 (6th Cir. 1972). Such opinion is appended hereto as Appendix B.

JURISDICTION

(a) The judgments of the United States Court of Appeals for the Sixth Circuit are dated May 9, 1972 and were filed and entered on that date.

(b) The statutory provision believed to confer on this Court jurisdiction to review the judgments by Writ of Certiorari is Section 1254(1) of Title 28 of the United States Code.

QUESTIONS PRESENTED FOR REVIEW

I. In a case arising under the equal pay provisions of the Fair Labor Standards Act, is it incumbent upon the trial court to make specific findings of fact in support of its conclusion as to whether or not the jobs in question involve equal work?

II. Can there be a violation of the equal pay provisions of the Fair Labor Standards Act after the jobs in question have been made available to both male and female employees, regardless of sex?

III. Is a letter from a Regional Director, Wage and Hour and Public Contracts Divisions, United States De-

partment of Labor, written after extensive consideration of the facts and circumstances and after full deliberation by such Regional Director, his staff and the staff of the Regional Attorney of the United States Department of Labor, a determination of the "agency" upon which the employer is entitled to rely under Section 10 of the Portal-to-Portal Act?

STATUTES INVOLVED

The statutes involved are as follows:

Sections 6(d)(1) and 6(d)(3) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. §206(d)(1) and §206(d)(3):

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.
>
> • • •

"(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter."

Sections 10(a) and 10(b)(1) of the Portal-to-Portal Act of 1947, 61 Stat. 84, as amended, 29 U.S.C. §259(a) and §259(b)(1):

"(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

"(b) The agency referred to in subsection (a) of this section shall be —

"(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor; * * *"

STATEMENT OF THE CASE

Nature of the Case

This action was commenced by the Secretary of Labor in the District Court, Eastern District of Kentucky, to enjoin Square D Company, hereinafter called "Company", from violating the Equal Pay Act of 1963, 29 U.S.C. ¶206(d), and from withholding wages allegedly due certain employees under such Act. The basis for jurisdiction in the District Court is Section 17 of the Fair Labor Standards Act, 29 U.S.C. §217.

The complaint was filed on May 3, 1967. Trial was held in June of 1968. Judgment was entered on November 6, 1970, more than two years after trial.

The District Court granted the relief sought by the Secretary in the complaint, with the exception that it limited the recovery of wages to the period from May 3, 1965 to March 1, 1966, holding in this respect that recovery for any prior period was barred by the time limitations set forth in Section 6 of the Portal-to-Portal Act (29 U.S.C. §255) and that recovery for any subsequent period was precluded, pursuant to Section 10 of the Portal-to-Portal Act (29 U.S.C. §259), by the Company's good faith reliance upon a written administrative declaration issued by the Regional Director of the Wage and Hour and Public Contracts Divisions of the Department of Labor on February 2, 1966.

The Court of Appeals affirmed the District Court in all respects except with regard to recovery of wages for the period after March 1, 1966. It directed a recovery after March 1, 1966 on the ground that the written administrative declaration of February 2, 1966 was not one upon which the Company was entitled to rely.

Facts

The Company is engaged at various locations throughout the United States in the manufacture and sale of electrical devices. The only facility here in question is the manufacturing plant located in Lexington, Kentucky.

The Lexington plant is engaged in the manufacture of switches, circuit breakers, inclosures, panel board service and transportation equipment and electrical ducts. The manufacturing process involves the shearing and forming of metal, the assembly of component parts of various devices and the final assembly of the devices into metal inclosures.

The employees involved in this proceeding are all represented by a union, the International Brotherhood of Electrical Workers, hereinafter called "IBEW".

Pursuant to the collective bargaining agreement between the Company and the IBEW dated March 1, 1964, certain jobs were designated as male and female, to-wit:

Machine Operator, Male
Machine Operator, Female
and
Assembler, Male
Assembler, Female

In each case the labor grade, and correspondingly the hourly rate of pay, for the job designated as "Male" was greater than that of the job designated as "Female".

Machine Operator, Female, was in Wage Grade 4 and Machine Operator, Male, was in Wage Grade 5. Assembler, Female, was in Wage Grade 3 and Assembler, Male, was in Wage Grade 5.

Pursuant to the same collective bargaining agreement, separate seniority lists were maintained for male and female employees. Women were not allowed to work on jobs designated as "Male" and vice versa. Women were thus separated from men because it was felt that the work designated as "Female" was the light type and generally of the nature within their physical capabilities to perform, whereas the other work was considered too heavy or strenuous for female employees.

The Department of Labor undertook an investigation of the Company's pay practices in February of 1965. The investigator observed the work in the plant and talked to employees and to members of management. The Company made available for his use an isolated location where he could conduct interviews in complete privacy. He remained in the plant for a period of from three to four weeks.

At the conclusion of the investigation, the investigator and the Company's Director of Personnel discussed the situation with respect to equal pay. Both conceded that since this was a new law there were many points which were not clear. The investigator stated that he could not give an official opinion, but he did suggest that the Company might want to consider restructuring jobs to avoid possible problems. He concluded by saying that his investigation was finished and that the Company would receive an opinion from either the Nashville office or the Washington office of the Department of Labor.

No opinion was forthcoming. Nothing at all happened further until November of 1965, some eight or nine months later, when a meeting was held at the Department of Labor office in Nashville. In attendance for the Company were its Director of Personnel and legal counsel and for the Department of Labor were the Regional Director, Wage and Hour and Public Contracts Divisions, his Assistant Regional Director and his counsel.

No final decisions were reached at the November meeting. Ideas were exchanged and the Company's representatives concluded by saying that they would study the situation further and would report back as to what the Company would do.

There was a second meeting at Nashville in December of 1965. At that time a proposal was submitted orally by the Company for the establishment of a basis whereby the question of equal pay compliance could be put to rest. All the persons who attended the November meeting were again in attendance except the Regional Director. The Assistant Regional Director indicated a receptiveness to the Company's proposal and said, "I'd like to have you submit this to me in writing."

The Company did commit its proposal to writing. It was submitted by letter and memorandum dated December 30, 1965.

With respect to machine operators, the Company explained in its memorandum the reasons why it believed the job content of the male job differed from that of the female job. Further, it expressed the belief that if both jobs were given the same duties, the employment opportunity for women would be substantially decreased since most women, if not all women, would find the work beyond

their capabilities. The Company's proposal was to continue to have one job in Wage Grade 5 and one in Wage Grade 4 but to remove the sex restrictions, thus providing the opportunity for the higher grade work to female as well as to male employees. It was further proposed that this revision would be accompanied by a clear explanation to the employees so that they would know the higher grade work was available regardless of sex.

With respect to assemblers, the Company's memorandum explained that there were three types of assembly in existence—subassembly, final assembly and packing and duct assembly. Duct assembly was not in issue and that subject was not further discussed. It was noted that subassembly was performed exclusively by women in Wage Grade 3 and that final assembly was performed both by men in Wage Grade 5 and by women in Wage Grade 3. The proposal was to leave subassembly in Wage Grade 3, reclassify that portion of final assembly previously performed by women in Wage Grade 3 to Wage Grade 4, retain that portion of final assembly previously performed by men in Wage Grade 5 and re-engineer the final assembly tracks so that Wage Grade 4 assemblers would be required to work only with weights of less than twenty-five pounds and assemblers in Wage Grade 5 would be required to work only with weights of twenty-five pounds or more. Coincidentally, as in the case of machine operators, the sex restrictions would be eliminated and employees would be advised clearly on that point.

With respect to the proposal as a whole, the Company advised that it was necessarily conditional upon consent by the IBEW since it would involve changes in the collective bargaining agreement. The Company went on to assure that "immediately upon being advised by the Labor

Department that the proposals would provide satisfactory answers to those questions concerning compliance with the [Equal Pay] Act", it would discuss the situation with the IBEW and would seek to obtain the necessary consent.

The Regional Director, Wage and Hour and Public Contracts Divisions, responded to the Company's proposal by letter dated February 2, 1966. That letter contained the following paragraphs:

> "This refers to your letter of December 30, 1965 and memorandum which set forth the Company's proposed rearrangement of duties and pay rates for employees classed as machine operators and assemblers at its Lexington, Kentucky plant
>
> "It is our understanding that when the changes become effective, work assignments to machine operators will be made to them on the basis of the ability of the employee to perform the tasks without regard to sex and that male and female employees performing equal work will receive the same rate of pay. In the case of employees performing final assembly and packing work, we understand that the male employees will in the future consistently work on substantially heavier items than the female employees. If our understanding is correct, and if the company operates in accordance with the proposal, we are not prepared to say that the proposed pay plan would contravene the equal pay provisions of the Fair Labor Standards Act with respect to the affected employees. You realize, of course, that the Courts might construe the equal pay requirements differently in situations such as those involved here."

Upon receipt of a copy of the Regional Director's letter, the Company's Director of Personnel, who was then engaged with the IBEW in negotiations for a new collective bargaining agreement, brought the matter of the Company's proposal into the discussion. After explanation of the situation, the proposal was accepted by the IBEW negotiating committee. However, the changes to be made formed a part of the overall contract settlement and, as such, required ratification by the IBEW membership as well.

Prior to the membership ratification vote, the IBEW described the Company's offer in a bulletin to employees. That bulletin contained an explanation of the equal pay matter.

The membership voted to ratify the settlement, and, accordingly, a new collective bargaining agreement was entered into as of March 1, 1966. That agreement implemented completely the propositions covered in the December 30, 1965 letter and memorandum to which the Regional Director had reference in his determination of February 2, 1966.

At about the same time, the Company and the IBEW jointly issued a communication to the employees assuring them that all jobs, not just machine operator and assembler jobs, henceforth would be open for bid regardless of sex.

Meanwhile, the Regional Director's letter of February 2, 1966 had included a suggestion for some voluntary agreement on back pay for the period prior to the implementation of the new arrangements. That subject had not been raised on any prior occasion. The Company therefore requested a meeting with the Department of Labor on that point. Such a meeting was held at Nashville in March of

1966. At that meeting the Assistant Regional Director asked that the Company's position on back pay, and the reasons therefore, be submitted in writing.

By letter dated March 18, 1966, the Company complied with the Assistant Regional Director's suggestion. The letter expressed the Company's position and, noting that the Assistant Regional Director had said that the matter would be referred to the Regional Attorney, it requested a conference with the Regional Attorney.

No reply to the March 18, 1966 letter ever was received.

In the latter part of April, 1967, more than one year later and without any forewarning, the Company was advised by the Department of Labor that the understandings previously reached were being repudiated by the Department *in toto* and, unless all machine operators and assemblers were moved forthwith to Wage Grade 5, a suit would be commenced against the Company.

The complaint was filed a few days thereafter.

ARGUMENT

The equal pay provisions of the Fair Labor Standards Act have not yet been construed by this Court. They are in their ninth year of operation and the development of lower court decisions has now progressed to the point where review by this Court is necessary. For the reasons set forth below, this case is appropriate as well as timely as the vehicle for such review.

I.

Equal pay as between the sexes is required only for "* * * *equal* work on jobs the performance of which requires *equal* skill, effort, and responsibility, and which are performed under similar working conditions, * * *." [29 U.S.C. §206(d)(1)] (Emphasis added).

Use of the term "equal" rather than terms such as "similar" or "comparable" establishes that the law as enacted is of distinctly limited scope. The legislative history, as described in *Shultz* v. *Kimberly-Clark Corporation*, 315 F. Supp. 1323, at 1331-1332 (W.D. Tenn. 1970), reveals that the choice was studied and intended.

This does not mean that in order to be subject to the equal pay requirements jobs must be absolutely identical. But if the differences are substantial, there is no equal pay obligation. *Hodgson* v. *Golden Isle Nursing Home, Inc.*, 64 CCH Labor Cases ¶32,445 (S.D. Fla. 1971); *Hodgson* v. *Fairmont Supply Co.*, 64 CCH Labor Cases ¶32,436 (N.D. W.Va. 1970); *Shultz* v. *Kimberly-Clark Corporation*, 315 F. Supp. 1323 (W.D. Tenn. 1970); *Shultz* v. *Kentucky Baptist Hospital*, 62 CCH Labor Cases ¶32,296 (W.D. Ky. 1969); *Wirtz* v. *Dennison Manufacturing Company*, 265 F. Supp. 787 at 789 (D. Mass. 1967).

Whether or not the differences between jobs are substantial is a question of fact which can be determined only from the evidence presented in the particular case at hand. *Wirtz* v. *Multi-Products, Inc.*, 59 CCH Labor Cases ¶32,124 (N.D. Ill. 1968). And the burden of proof rests with the Secretary. *Hodgson* v. *Brookhaven General Hospital*, 436 F.2d 719 (5th Cir. 1970); *Wirtz* v. *Muskogee Jones Store Company*, 293 F. Supp. 1034 at 1037 (E.D. Okla. 1968); *Wirtz* v. *Multi-Products Company, Inc.*, 59 CCH Labor Cases ¶32,124 (N.D. Ill. 1968); *Wirtz* v. *Citizens First National Bank*, 58 CCH Labor Cases ¶32,050 (E.D. Texas 1968). In other words, the Secretary must show by a preponderance of proof that the differences between the jobs are *not* substantial.

With this background, the Third Circuit and the Fifth Circuit have held that a trial court must make findings of fact which are sufficiently thorough and specific to permit a meaningful determination as to whether the Secretary's burden has been met. Both these courts have held that mere statements of conclusion by the trial court are inadequate. *Hodgson* v. *Brookhaven General Hospital*, 436 F.2d 719 (5th Cir. 1970); *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3rd Cir.) *cert. denied*, 398 U.S. 905 (1970).

In the instant case, the District Court reached only a generalized conclusion, impossible to evaluate on the basis of any specific findings of fact, and the Court of Appeals upheld the decision. The District Court obviously felt that a superficial review of the record—"cursory" to use its own word—was enough, with its impressions as a satisfactory substitute for a careful analysis.

Thus there is a clear and definite split between the Third and Fifth Circuits on the one hand and the Sixth Circuit on the other as to the kind of analysis which is required.

And the extent of the conflict is made apparent by comparing the statements of the respective trial courts.

For example, in *Brookhaven,* one finding of the trial court held to be insufficient on appeal reads:

> "9. Only an insignificant portion of an orderly's time is spent in performing catheterizations." (436 F. 2d at 725, n. 6)

Compare that to a statement by the District Court in the instant case:

> "Only a small percentage of the total work time of the 5A operators is devoted to handling duties." (App. 5)

Both pronouncements are equally general and both are mere conclusions.

For another example, in *Wheaton Glass,* the trial court stated:

> " 'substantial differences exist, in fact, in the full job cycles between the sexes, thereby justifying the disparity in their wages.' " (421 F.2d at 267)

The Third Circuit held that to be not a finding of fact but only a statement of conclusion. Compare it with this statement by the District Court in this case:

> "There are differences between the 5A, 4B and 3C jobs in the degree of effort needed to perform the duties of these positions, but this court is not prepared to say that such differences are substantial and justify a disparity in wages." (App. 6)

Although taking the opposite direction, the statement by the District Court is no less a mere conclusion.

The lack of specific findings in the instant case is critical. For example, the Company produced evidence showing that machine operators in Wage Grade 4 spend practically 100% of their working time operating machines to make small parts whereas machine operators in Wage Grade 5 spent only 38% of their working time on that work, the balance being consumed in material handling (12%) and making larger parts (50%) which are *never* produced in Wage Grade 4. At no time did either the District Court or the Court of Appeals make any finding as to whether or not this most crucial evidence was either accepted or rejected. It was simply avoided *sub silentio.*

II.

Assuming, *arguendo,* that there were sufficient findings to support the judgments, there still is an important question of law which has not been, but should be, settled by this Court. That question involves the impact of the law upon an employer's operations after its jobs have been made available to employees of both sexes.

Neither the District Court nor the Court of Appeals found that the Company did not in fact open all machine operator jobs and all assembler jobs to both sexes on March 1, 1966. Nor did either court deny that the decision to maintain different wage grades with corresponding rate differentials was the result of a collective bargaining decision reached by the Company and the IBEW with emphasis upon the fact that sex was no longer a factor in job placement.

In spite of these propositions, the District Court concluded, with the approval of the Court of Appeals, as follows:

> "If at the outset women perform work equal to that of men, but receive a lower wage, and continue to perform equal work for a lower wage after sex designations have been removed; the Act has not been satisfied." (App. 11)

Of course, when sex designations are removed women receive a lower wage strictly as a matter of choice—they can move to the higher rated jobs freely if they want them. Therefore, what the District Court conclusion really means is that once it has been judicially decided that two jobs are equal they must forever be paid the same even if sex is removed as a factor and even if the employer and the union believe strongly that such jobs are not equal.

Such a result is incompatible with the Congressional intent, repeated over and over in the Congressional Record, to the effect that a differential based upon any factor other than sex is beyond judicial intervention. As explained by Congressman Godell, one of the chief architects of the Equal Pay Act:

> "[W]e want the private enterprise system, employer and employees and a Union, if there is a union * * * to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he shall be paid for it." (109 Cong. Rec. 9198)

It would have been a far different thing if the Company simply had been required to raise the pay rate of all machine operators and assemblers to that which had been paid to males immediately prior to March 1, 1966. Under that sort of ruling the Company could have thereafter maintained rate differentials with the old male rates as the floor for the lower of the newly desegregated jobs.

With that there could be no quarrel because with that the Company and the IBEW would still be able to evaluate the relative worth of the jobs as they see fit. That is all that ever has been required except in the instant case. See *Shultz* v. *Saxonburg Ceramics, Inc.*, 314 F. Supp. 1139, 1146 (W.D. Penn. 1970); *Wirtz* v. *Koller Craft Plastic Products, Inc.*, 296 F. Supp. 1195, 1197-1199 (E.D. Mo. 1968).

The instant case has gone much further. The decision here has rendered the Company's right to maintain more than a single grade of assembly and machine operator work perpetually forfeit.

Finally, the decision here affects more than just the Company. If it is allowed to stand, it will establish a proposition which will affect virtually every employer with a multi-rate job structure attempting to make all its work available to employees regardless of sex after previously having had separate male and female classifications.

III.

Section 10 of the Portal-to-Portal Act relieves an employer from any responsibility for unpaid wages during any period of time when it has relied upon a written administrative regulation, order, ruling, approval or interpretation of "the *agency* of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such *agency.*" 29 U.S.C. §259(a). (Emphasis added.)

The "agency" specified in subsection (b) is the Administrator of the Wage and Hour Division of the Department of Labor. The Court of Appeals held that this means that an employer can rely only upon something issued by the

Administrator himself, as an individual. If that is correct, then it is difficult to see why Congress chose to use the word "agency".

Certainly the agency does not speak for purposes of Section 10 through an investigator, through a lower level supervisor, or the like. But a Regional Director of the Wage and Hour and Public Contracts Divisions is not in that category.

It is important that this Court give guidance as to the meaning of "agency". Otherwise, no employer can hope to find a secure way to resolve questions of equal pay short of litigation.

The intent of Congress must have been that there should be deemed to be a determination of the "agency" whenever the resources of that agency as an agency are brought to bear upon a problem with full and deliberate attention and study. That is precisely what happened in the instant case.

CONCLUSION

For the reasons set forth above, we ask that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

No. 1771

James D. Hodgson, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

Square D Company,

Defendant.

MEMORANDUM
(Filed October 7, 1970)

This is an action by the plaintiff, James D. Hodgson, Secretary of Labor, United States Department of Labor, to enjoin the defendant, Square D Company, from violating the provisions of Sections 15(a)(1) and 15(a)(2) of the Fair Labor Standards Act of 1938 as amended (hereinafter referred to as the Act). Specifically the controversy involves the equal pay for equal work provision of Section 6 of the Act. The plaintiff contends the defendant has withheld and continues to withhold wages due and owing to certain of the defendant's female employees.

The defendant, a Michigan corporation authorized to do business in Kentucky, is engaged in the production of electrical devices and equipment. Substantial quantities of the defendant's product are transported,

shipped, delivered and sold in commerce. There is no dispute that the defendant is engaged in commerce or that its employees are covered by Section 6 of the Act. The gravamen of the case is whether the defendant has and continues to violate the equal pay for equal work provision of Section 6.

Section 6(d) of the Act reads as follows:

> "(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to the employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: . . ."

The litigation centers around wage scales within two of the defendant's job titles; machine operators and assemblers. The defendant does not contend the wage disparity within these two categories is based on a merit system, a seniority system, or a system measuring quantity or quality of production.

Prior to a plan negotiated and ratified in 1966 by the International Brotherhood of Electrical Workers, which represents all of the employees pertinent to this case, the wage

grades of assemblers and machine operators were designated as such:

Wage Grade	Job Title
5	machine operator, male
4	machine operator, female
5	assembler, male
4 (sic)	assembler, female

The Department of Labor, in an investigation conducted in 1965, concluded the pay practices of the defendant at that time were in violation of the Act. Consequently, the current wage designation plan was adopted in 1966. This plan, with the addition of a sub-assembly classification, retains the same job titles, except sex designations are absent and bidding on the jobs is purportedly open to all employees, regardless of sex. The 1966 plan is represented by the following chart:

Wage Grade	Job Title
5 (5C)	machine operator, A
4 (4B)	machine operator, B
5 (5B)	assembler, A
4 (4F)	assembler, B
3 (3C)	assembler, C

There is a wage disparity of approximately 9 cents per hour between the A and B machine operators, and a wage disparity of approximately 9 cents per hour between the A and B assemblers. There is a 16 cents per hour difference between the A and C assemblers.

The B job titles continue to be filled by female employees, whereas the A classifications are, with one or two possible exceptions, held by male employees. The plaintiff argues and has undertaken to prove the wage dis-

parity is grounded on sex alone, and therefore in contravention of the Act. The defendant asserts the disparity in wages is based upon a difference in effort and responsibility required of the different classes of employees, and alternatively argues, if those distinctions are held to be too subtle for legal recognition, that the pay differences are not based on sex because all of the jobs in question were, by the 1966 plan, made available to both men and women.

A cursory examination of the duties and work requirements of the two classes of machine operators and three divisions of assemblers is appropriate.

Machine Operators

The 5A (wage grade 5C) and 4B (wage grade 4B) machine operators perform the same type of work and indiscriminately use the same machines. The machines operated by the males and females are drill presses, tapping machines, brake presses and punch presses. The defendant's witnesses have testified that the 5A machine operators spend 38 per cent of their time fabricating parts greater than 288 square inches in size, while the 4B wage grade workers spend 100 per cent of their time making parts less than 288 square inches in size. The value of this distinction is equivocal. It has not been shown that it is any more difficult or requires any more effort to produce a part having an area in excess of 288 square inches than a part of 288 square inches or less, nor has it been shown that the difference in size of the parts manufactured by the 4B and 5A workers is substantial.

The primary distinction between the 5A and 4B machine operators is based upon handling work the 5A operators are required to perform. The 5A workers must carry, lift and move pallets, place loads of stock alongside pallets,

carry and restock equipment, clean up work areas, and discard scrape (sic) material. Some of this work necessitates the use of a "walk along" which is a self propelled electrical cart used for moving stock and equipment. The defendant contends the operation of the "walk along" entails a responsibility for the safety of others, which is not required of the 4B employees.

Only a small percentage of the total work time of the 5A operators is devoted to handling duties.

Assemblers

Generally the 5A, 4B and 3C assemblers perform the same type of work and use the same type of tools, which are; screw drivers, electrically powered screw drivers, hammers, and tap guns. The defendant, by the 1966 contract, has divided the assemblers into three categories; 1) sub-assembly (Title 3C, wage grade 3C); 2) final assembly of devices weighing less than 25 pounds and packing of those devices (Title 4B, wage grade 4F); and 3) final assembly of devices weighing more than 25 pounds (Title 5A, wage grade 5B).

The 3C assembly workers manufacture interior parts which are subsequently used in the production process. Many of the 3C jobs are sitting jobs which are performed at a fixed work station.

The 4B employees assemble interior and base parts. They also install the interior or base parts into the outside housings which are manufactured by the 5A workers.

The 5A workers build the exterior parts of the devices assembled by the 3C and 4B workers.

The defendant contends the 4B and 5A jobs are distinguishable in that the 5A assemblers work on units weighing more than 25 pounds, whereas the 4B assemblers work on devices weighing less than 25 pounds.

The distinction is of questionable value because it is based on the weight of the completed unit, and because the variance from the 25 pound demarcation line is not great.

The 5A assemblers also have some material handling duties similar to those of the 5A machine operators, but it appears that the extent of these duties is small and only comprises a fractional per centage (sic) of their total work time.

For the most part the three classifications of assemblers perform the same type of work, and the two classifications of machine operators perform the same type of work. None of the job classifications require any particular training, proficiency or skill. The defendant claims exemption from the equal pay provision of the Act contending the job positions differ in requirements of effort and responsibility. The defendant has relied heavily on the fact that the 5A employees spend a certain per centage (sic) of their time working on larger or heavier parts, and have material handling duties in addition to their normal work.

If the equal pay standard is not to apply, there must be notable differences in the degree and amount of effort required to be expended in performance of the jobs. There are differences between the 5A, 4B and 3C jobs in the degree of effort needed to perform the duties of those positions, but this court is not prepared to say that such differences are substantial and justify a disparity in wages. The defendant has attempted to show that there are differences in the responsibility between the 5A, 4B and 3C jobs, but these differences are largely contrived and of no great moment. The jobs in question are not identical, but their differences are insubstantial and minor and not those ordinarily associated with differences in wage levels. The

mere fact that the jobs of the assembly workers and machine operators may be divided into arbitrary categories does not mean they require unequal degrees of skill, work effort and responsibility.

It is, of course, not within the power or province of the courts to determine job classifications. It would, therefore, seem that different wage rates could be paid without violating the provisions of the Act, so long as the wage differential was not based on sex. The Act disallows wage discrimination based on sex.

The defendant has opened its job positions to both sexes, and argues that in doing so it has complied with Section 6(d) of the Act. It is strange, in light of the defendant's open bidding policy, that the jobs are not completely integrated with men and women. It could be inferred, as the defendant has postulated, that the women are unable to meet the physical requirements needed to fulfill the job duties of the upper wage levels. There are, however, other reasons which might explain the absence of women from the higher wage scale jobs. Several women expressed some apprehension in being exposed to the perhaps embarrassing atmosphere of working in groups comprised entirely of men. The testimony also revealed that some of the women who applied for the 5A positions were subjected to conference with their superiors where they were advised of the nature of the work which would be required of them and were beseeched to remain at their present position for their own physical well being.

Certainly there could be many psychological influences which might deter an employer (sic) from seeking a higher position. The plaintiff contends that the burden of compliance with the Act cannot be shifted to the employee, as

the defendant's scheme has apparently done, and that despite a technical compliance with the terms of the Act, the defendant has continued its discriminatory policies.

It is this court's opinion that the women within the 4B and 3C job titles perform work essentially equal in skill, effort and responsibility as that performed by men in the 5A positions, but receive a wage lower than the men. Consequently, the case resolves to a question of whether the defendant's open bidding policy satisfies the Congressional intent and purpose of the Act.

Two recent cases are of a particular interest because of their factual similarity in regard to the open bidding policy of Square D Company. The cases are Wirtz v. Koller Craft Plastic Products, 296 F. Supp. 1195 (1968), and Wirtz v. American Can Company—Dixie Products, 288 F. Supp. 23 (1968).

The Koller case involved two classes of machine operators. Prior to a 1967 contract eliminating sex designations, class A machine operators were male, and class B machine operators were female. Class A employees were paid on the average 10 cents more per hour. Many of the class A employees operated class B machines. The court determined that the work performed by the class A men on the B machines was equal in all respects to the work performed by the women on the B machines. The court concluded, however, that the 1967 contract deleting sex designations complied with the Act and relieved the defendant from liability. The opinion of the United States District Court for the Eastern District of Missouri included the following language:

> "Plaintiff argues that the very continuance of a wage differential between A and B operators under the new contract of itself constitutes a discrimination on the basis of sex. We do not agree. . . .

"Over and beyond the differences between the work of A and B operators is the undisputed fact that although the A classification was formerly limited to men, such is no longer the case under the new contract. The evidence discloses that defendant has made A operator jobs available to both men and women on a non-discriminatory basis.

". . . So long as the difference between the wage rates which defendant pays for different jobs is not based on sex, we may not interfere."

In the Koller case the court found that a scheme similar to that of the present defendant satisfied the requirements of the Act.

The defendant in Wirtz v. American Can Company—Dixie Products, supra, also eliminated sex designations from his wage grade classifications. Prior to a contract negotiated in 1965, the American Can Company limited its night shift jobs to men and its day shift or A.M.-P.M. openings to women. The night shift workers were paid a greater wage. The 1965 contract opened all job classifications to all employees without regard to sex, but women, for one reason or another did not apply for, or upon application did not receive jobs in the night shift. The district court held that the jobs were distinguishable in the amount and degree of effort, skill and responsibility required to perform them.

The district court was reversed by the United States Court of Appeals for the Eighth Circuit. In reversing the lower court, the Court of Appeals concluded the Secretary of Labor had sustained the burden of proving the jobs were equal. The opinion stated that:

> ". . . the handling and loading functions of the night shift operators, while performed regularly, are minor and incidental. They do not involve the exertion of substantial additional effort. Most of the physical and mental effort exerted in the performance of the job is related to the operation of the machines."

The Court's opinion also considered the fact that the union contract of 1965 had opened all positions to all employees regardless of sex. The Court stated:

> "At the outset, we think it clear that the Company did not cure the alleged violation of the Equal Pay Act by agreeing to open the night shift to women. If in fact the work of the women was equal to that of the men, the Company became obligated to pay them the same scale as their counterparts on the effective date of the Act, June 11, 1965. It could not relieve itself of the obligation by agreeing to allow some women to work on the night shift at a higher rate of pay at some future date when a vacancy occurred.
>
> ". . . The wage differential was initially, at least in part, based on sex. This factor, while not a controlling one, is some indication of the Company's view of the job uninhibited by the passage of the Equal Pay Act."

The American Can Company case stands for the proposition that a technical compliance with the Act is not sufficient. If women perform the same type of work, equal in skill, effort and responsibility, as do men, they must be paid an equal wage, notwithstanding their right to apply for and perhaps obtain jobs in the higher wage classifications. The purpose of the Act is not to prevent unequal access to jobs, but to prevent unequal pay for es-

sentially equal jobs. If two jobs are equal in all respects, except for wage disparity, the ability of both sexes to occupy those positions does not satisfy the Act.

It would be illogical for this court to hold that the jobs are equal in regard to skill, effort, and responsibility, and then conclude that the open bidding contract of 1966 alleviated all discrimination and justified a wage disparity. If at the outset women perform work equal to that of men, but receive a lower wage, and continue to perform equal work for a lower wage after sex designations have been removed; the Act has not been satisfied. The defendant may have achieved a conceptual compliance with the equal pay for equal work provision of the Act, but it has not achieved the functional result which the Act demands. The virtue of a law is found not within its conceptual construction or interpretation, but in its functional purpose and application. The women in this case perform the same work for the same wage as they did prior to the 1966 contract. The Department of Labor was at that time, in 1965, of the opinion that the Square D Company was violating the Act. Nothing has changed since the Department of Labor's 1965 investigation, except that the defendant now claims a theoretical compliance with the Act.

It is this court's opinion that the plaintiff is entitled to the injunctive relief prayed for in the complaint.

The Portal-to-Portal Act, 29 U.S.C. 255, sets a limitation on all actions arising under Section 6 of the Fair Labor Standards Act of two years. Section 6 of Part IV of the Portal-to-Portal Act reads as follows:

"SEC. 6. STATUTE OF LIMITATIONS.—Any action commenced on or after the date of the enactment

of this Act to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

(a) if the cause of action accrues on or after the date of the enactment of this Act—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, . . ."

This action was filed on May 3, 1967. In accordance with Section 6 of Part IV the plaintiff's remedy is limited retrospectively to May 3, 1965.

Furthermore it is the court's opinion that the defendant has acted in good faith since the execution of the contract negotiated by the International Brotherhood of Electrical Workers on March 1, 1966. The Portal-to-Portal Act relieves employers who have acted in good faith in conformity with and in reliance on any written administrative order, ruling, or approval. Portal-to-Portal Act, Part IV, Section 10, 29 U.S.C. 259(a). On February 2, 1966, the defendant received a letter from the Regional Director of the Department of Labor concerning the proposed plan which was subsequently adopted on March 1, 1966. The letter temporized by saying that the Department was not at that time prepared to say whether the proposed plan contravened the equal pay provision of the Act. At that time no court rulings interpreting the Equal Pay Act had been reported. Although the letter did not explicitly condone the plan it did not condemn it. The defendant's

actions, after receipt of the February 2, 1966, letter were, under the circumstances, reasonable, and it should not be held liable for back wages under Section 6 of the Fair Labor Standards Act from that time (the inception of the current plan) forward. The employees of the defendant are only entitled to a claim for back wages between May 3, 1965, and March 1, 1966.

Plaintiff's attorneys are directed to compute the amount of unpaid wages and to prepare an order, to be submitted to this court for entry, in conformity with the opinion expressed in this memorandum.

/s/ Mac Swinford
Mac Swinford, Judge

October 7, 1970

APPENDIX B

Nos. 71-1231-32
UNITED STATES COURT OF APPEALS
For the Sixth Circuit

JAMES D. HODGSON, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee and Cross-Appellant,

v.

SQUARE D COMPANY, a corporation,
Defendant-Appellant and Cross-Appellee.

Appeal from the United States District Court,
Eastern District of Kentucky.

Decided and Filed May 9, 1972.

Before: EDWARDS, PECK and KENT, Circuit Judges.

KENT, Circuit Judge. This is an appeal by Square D Company (Company), and a cross-appeal by the Secretary of Labor (Secretary), from a judgment of the District Court finding that the Company had violated the provisions of 29 U.S.C. §§206(d)(1) and (3):

> "(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to

employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided,* That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

"(3) For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this subsection shall be deemed to be unpaid minimum wages or unpaid overtime compensation under this chapter."

and 29 U.S.C. §§ 215(a)(1) and (2):

"§215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 206 or section 207 of this title, or in violation of any regulation or order of the Administrator issued

under section 214 of this title; except that no provision of this chapter shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this chapter shall excuse any common carrier from its obligation to accept any goods for transportation; and except that any such transportation, offer, shipment, delivery, or sale of such goods by a purchaser who acquired them in good faith in reliance on written assurance from the producer that the goods were produced in compliance with the requirements of this chapter, and who acquired such goods for value without notice of any such violation, shall not be deemed unlawful;

(2) to violate any of the provisions of section 206 or section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under section 214 of this title."

The District Court concluded that the Company had unlawfully discriminated against women employees by paying lower wages for equal work and entered an award for back pay for the period from May 3, 1965 to March 1, 1966. The trial court held that recovery for back wages prior to May 3, 1965 was barred by the provisions of Section 6 of the Portal-to-Portal Act, 29 U.S.C. § 255:

"§ 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of

1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act—

> (a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued;"

and that recovery of back wages after March 1, 1966 was barred by the Company's good faith reliance upon a letter received from the Regional Director, Wage and Hour and Public Contracts Division of the United States Department of Labor, which the Company treated as an approval of its *plan* (put into effect March 1, 1966) to abolish sex discrimination in employment about which the Secretary had made complaint, pursuant to Section 10 of the Portal-to-Portal Act, 29 U.S.C. §259:

> §259. Reliance in future on administrative rulings, etc.
>
> (a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section or any administrative practice or enforcement policy of such agency with respect to the class of employers to which

> he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect."

There is no question raised but that the Company is engaged in the production of products sold in interstate commerce within the meaning of Section 206(d) of the Act.

Before May 3, 1965, the Company had different wage grades for different classifications of employment. Some of the classifications of employment were designated "male" and some were designated "female." There were categories of employment related to machine operations and assembly operations for each sex. The Company contended that the categories were fundamentally distinct and required different degrees of physical effort justifying classification as "male" or "female." The trial court concluded that the distinctions which the Company asserted existed with regard to the job classifications and to the revised job classifications were largely contrived and illusory both before and after March 1, 1966. Thereafter he concluded that any pay differentials based on such classifications were unjustified and violated the provisions of the Act. He limited recovery of back wages, however, because of the letter, to which reference has been made, addressed to the Company by the Regional Director.

At the outset the Company claims in its appeal that the Secretary of Labor did not meet the burden of proof of establishing that the jobs in question were equal within the

meaning of the statute and that the District Court's findings of fact on which was based the determination of such equality were insufficient. Adequate findings of fact by the trial judge are essential to the resolution of a dispute of this nature. *Hodgson* v. *Brookhaven General Hospital,* 436 F.2d 719 (5th Cir. 1970).

Upon examination of the record and the opinion of the District Judge it appears to this Court that the trial judge did in fact make findings responsive to the criteria set forth in the statute prohibiting wage discrimination based on sex, except for the similarity of working conditions, a factor which on this record does not appear to have been in dispute. The statute, 29 U.S.C. §206(d)(1) prohibits wage discrimination based on sex: "* * * on jobs the performance of which require equal skill, effort, and responsibility, and which are performed under similar working conditions, * * *." From the District Court opinion it appears that the District Judge examined the facts in the light of the statutory standards and made findings which are sufficient to enable this Court to ascertain that the proper tests were applied to the evidence.

We cannot set aside the findings of fact of the District Judge unless they are clearly erroneous. Rule 52(a), Rules of Civil Procedure, 28 U.S.C.A.; *Strickler* v. *Pfister Associated Growers, Inc.,* 319 F.2d 788, 790 (6th Cir. 1963). Even a cursory review of this record, which has been carefully reviewed, establishes that the District Judge's findings were not clearly erroneous but in fact they appear to be eminently correct. That same careful review of the record clearly establishes that the Secretary met the burden of proof required in an action based on this statute.

Much of the evidence was directed to the question of the equality of skill, effort and responsibility required to perform the work in the job classifications as revised effective

March 1, 1966. The Secretary called as witnesses employees of the Company who testified as to their duties, the manner in which they spent their working time, the weight of the material and products handled, etc. The Company called as witnesses employees, company engineers and officials who testified as to differences in the job classification requirements. Clearly these were issues of fact to be resolved by the District Judge. We are satisfied that the findings of fact in his opinion are clear and supported by the evidence.

The Company also claims that by the changes made in job classifications, which made all jobs "available" to all employees regardless of sex after March 1, 1966, it corrected any violation of the statute. This position was rejected by the trial court and is rejected by this Court. Women were not shifted from one classification to another to any substantial degree but each classification was opened as jobs might become available. This was not sufficient. As stated in *Shultz* v. *American Can Company-Dixie Products,* 424 F.2d 356, 359 (8th Cir. 1970):

> "[1] At the outset, we think it clear that the Company did not cure the alleged violation of the Equal Pay Act by agreeing to open the night shift to women. If in fact the work of the women was equal to that of the men, the Company became obligated to pay them the same scale as their male counterparts on the effective date of the Act, June 11, 1965. It could not relieve itself of that obligation by agreeing to allow some women to work on the night shift at a higher rate of pay at some future date when a vacancy occurred."

The law relating to continued violations of the Act, despite changes making all classifications available without regard to sex is as set forth in *Shultz* v. *Saxonberg Ceramics, Inc.*, 314 F.Supp. 1139, 1146 (W.D. Pa. 1970):

> "[9] Plaintiff contends that inasmuch as the two jobs were equal within the terms of the Act and that men operators no longer operate these machines, that the continued payment of the 'old', lower rate to the female operators who are now exclusively operating the machines is an impermissible wage differential since it amounts to a wage reduction. We agree. *This violation will continue until the company, by new contractual arrangement by voluntary action or by court order, raises, or is forced to raise, the wages of the female operators to that of the male operators as of the time the males ceased to operate the machines together with all increments to date.*" [Citations omitted] (Emphasis supplied)

The trial judge was correct in concluding that the Company was discriminating against female employees in violation of the Act on May 3, 1965, and that the discrimination continued despite the Company's changes of classification and despite the fact that all classifications were "available" regardless of sex, in the event there were new openings.

Insofar as the Company's appeal is concerned the judgment of the District Court must be affirmed.

This brings us to the Secretary's cross-appeal which raises the issue as to the right of the Company to rely upon the letter of February 2, 1966, written by the Regional Director, Wage and Hour and Public Contracts Division of the United States Department of Labor. In the letter the

Regional Director stated, in part, in relation to propose rearrangements of job classifications and pay rates for th employees:

> "If our understanding is correct, and if the Com pany operates in accordance with the proposal, we ar not prepared to say that the proposed pay plan woul contravene the equal pay provisions of the Fair Labo Standards Act with respect to the affected employees You realize, of course, that the courts might constru the equal pay requirements differently in situation such as those involved here."

After receipt of the letter the Company executed a ne contract with the Union which represented its employees effective March 1, 1966. In discussing the letter and th new contract and refusing to find liability for back wage beyond March 1, 1966, the trial judge stated as follows

> "Furthermore it is the court's opinion that the de fendant has acted in good faith since the execution o the contract negotiated by the International Brother hood of Electrical Workers on March 1, 1966. Th Portal-to-Portal Act relieves employers who have act ed in good faith in conformity with and in reliance o any written administrative order, ruling, or approval Portal-to-Portal Act, Part IV, Section 10, 29 U.S.C 259(a). On February 2, 1966, the defendant received a letter from the Regional Director of the Department of Labor concerning the proposed plan which was subsequently adopted on March 1, 1966. The letter temporized by saying that the Department was not a that time prepared to say whether the proposed plan contravened the equal pay provision of the Act. A that time no court rulings interpreting the Equal Pay

Act had been reported. Although the letter did not explicitly condone the plan it did not condemn it. The defendant's actions, after receipt of the February 2, 1966, letter were, under the circumstances, reasonable, and it should not be held liable for back wages under Section 6 of the Fair Labor Standards Act from that time (the inception of the current plan) forward". (App. pp. 638-639)

It is the Secretary's contention that the letter received could not under the statute, or the regulations issued thereunder, form a basis for the defense of good faith reliance as found by the trial judge. The Statute 29 U.S.C. §259(a) and §259(b) provides as follows:

"§259. Reliance in future on administrative rulings, etc.

(a) In any action or proceeding based on any act or omission on or after May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the agency of the United States specified in subsection (b) of this section, or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged. Such a defense, if established, shall be a bar to the action or proceeding, notwithstanding that after such act or omission, such administrative

regulation, order, ruling, approval, interpretation, practice, or enforcement policy is modified or rescinded or is determined by judicial authority to be invalid or of no legal effect.

(b) The agency referred to in subsection (a) of this section shall be—

(1) in the case of the Fair Labor Standards Act of 1938, as amended—the Administrator of the Wage and Hour Division of the Department of Labor;

(2) in the case of the Walsh-Healey Act—the Secretary of Labor, or any Federal officer utilized by him in the administration of such Act; and

(3 in the case of the Bacon-Davis Act—the Secretary of Labor."

These actions were brought under the Fair Labor Standards Act of 1938, as amended. §259(a) requires that the writing must be "of the agency of the United States specified in subsection (b) of this section," and §259(b) specifically provides, *inter alia,* that the agency referred to in subsection (a) shall be "the *Administrator* of the Wage and Hour Division of the Department of Labor." (Emphasis supplied). The Company argues that "Administrator" means the organization rather than the individual, but unfortunately the regulations and the case law do not support the Company's position. It is provided in 29 C.F.R. §790.13:

"DEFENSE OF GOOD FAITH RELIANCE ON ADMINISTRATIVE REGULATIONS, ETC.

§790.13 General nature of defense.

(a) Under the provisions of sections 9 and 10 of the Portal Act, an employer has a defense against liability or punishment in any action or proceeding brought against him for failure to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act, where the employer pleads and proves that 'the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation' or 'any administrative practice or enforcement policy * * * with respect to the class of employers to which he belonged.' In order to provide a defense with respect to acts or omissions occurring on or after May 14, 1947 (the effective date of the Portal Act), the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of the 'Administrator of the Wage and Hour Division of the Department of Labor,' and a regulation, order, ruling, approval, or interpretation of the Administrator may be relied on only if it is in writing."

and in 29 C.F.R. §790.19:

"(a) In order to provide a defense under section 9 or section 10 of the Portal Act, the regulation, order, ruling, approval, interpretation, administrative practice or enforcement policy relied upon and conformed with must be that of an 'agency of the United States.' Insofar as acts or omissions occurring on or after May 14, 1947 are concerned, it must be that of the 'agency of the United States specified in' section 10

(b), which, in the case of the Fair Labor Standards Act, is 'the Administrator of the Wage and Hour Division of the Department of Labor.' "

The position taken by the Company was rejected by the Tenth Circuit in *United States* v. *Stocks Lincoln-Mercury, Inc.*, 307 F.2d 266 (1962), at pages 270, 271:

"Section 10(b) (1) of the Portal to Portal Act provides that the 'agency of the United States' whose rulings may be relied upon in the case of the Fair Labor Standards Act of 1938 is the Administrator of the Wage and Hour Division of the Department of Labor. Such Administrator is the person designated by statute to administer the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U.S.C.A. §201 et seq."

"[1] If paragraphs (1), (2) and (3) of subsection (b) of §10 of the Portal to Portal Act are to be given a uniform construction, then the agency contemplated in each is the official vested with primary or final authority to administer the provisions of the particular Act in question, not a minor official in such agency.

"That construction comports with the Congressional intent, manifested by the debates when the Bill was before the House and Senate;[2] by a floor amendment explained and adopted in the Senate[3] and particularly by the language of the Conference Report on the Bill, which in part reads:[4]

'It should also be noted that under both sections 9 and 10 the regulations, interpretations, enforcement policies, etc., which may be in good faith relied on must be those of an "agency" and not of an individual officer or employee of the agency. Thus if inspector A tells the employer that the

> agency interpretation is that the employer is not subject to the Act, the employer is not relieved from liability, despite his reliance in good faith on such interpretation, unless it is in fact the interpretation of the agency.' "

And see also *National Automatic Laundry and Cleaning Council* v. *Shultz*, 443 F.2d 689, 700 (D.C. Cir. 1971); *Murphy* v. *Miller Brewing Company*, 307 F.Supp. 829, 838 (E.D. Wisc. 1969), *Aff'd.* No. 18560, *Hodgson* v. *Miller Brewing Company;* No. 18929, *Murphy, et al* v. *Miller Brewing Company* (consolidated) (7th Cir., March 2, 1972).

Having reached the conclusion that the Company was not justified in relying upon the letter from the Regional Director we reverse the conclusion of the District Court that the Company was excused from paying back wages after March 1, 1966. We find it unnecessary to discuss any other claimed errors.

The judgment is affirmed in part and reversed in part and remanded to the District Court for further proceedings not inconsistent with this opinion.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-187

SQUARE D COMPANY, PETITIONER

v.

JAMES D. HODGSON, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

This suit was brought by the Secretary of Labor to enjoin the petitioner from withholding wages due to certain female employees in violation of 29 U.S.C. 206(d) (Section 6(d) of the Fair Labor Standards Act), which forbids discrimination between employees on the basis of sex by paying women lower wages than men for work requiring equal skill, effort and responsibility. Petitioner claimed that in the jobs involved (machine operator and assembler) the higher paid classes required greater effort and responsibil-

ity, and that since March 1, 1966, jobs in the higher paid categories had been made available to women as vacancies occurred. Finally, petitioner contended that there could be no recovery for unpaid wages accruing after March 1, 1966, the date on which it instituted its current pay plan in claimed reliance on a letter from the Regional Director of the Department of Labor.[1] That letter was the culmination of an investigation by the Department which led to the substitution of the current job classifications for the former, openly discriminatory, categories. The letter stated "we are not prepared to say that the proposed pay plan would contravene the equal pay provisions of the Fair Labor Standards Act * * *. You realize, of course, that the courts might construe the equal pay requirements differently in situations such as those involved here" (Pet. App. 22).

After discussion of the various requirements of the job classifications involved, the district court found that the differences between the classes of the jobs involved "are insubstantial and minor and not those ordinarily associated with differences in wage levels" (Pet. App. 6). The court then rejected petitioner's contention that the availability to women of jobs in the more highly paid classes constitutes com-

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[1] Section 10(a) of the Portal-to-Portal Act (29 U.S.C. 259 (a)) relieves an employer from liability for failure to pay wages as required by the Fair Labor Standards Act if he relies on a written interpretation of an agency specified in subsection (b). Subsection (b) defines "agency" for Fair Labor Standards Act cases as the Administrator of the Wage and Hour Division of the Department of Labor.

pliance with 29 U.S.C. 206(d).[2] Finally, the court concluded that petitioner's reliance on the letter from the Regional Director was a good defense against claims for back wages accruing after March 1, 1966.

The court of appeals affirmed the rulings adverse to petitioner, noting that the district court properly applied the statutory standards to the facts, and that its findings of fact were clear, sufficient, and supported by the evidence (Pet. App. 19-20). The court of appeals reversed the judgment below insofar as it found that petitioner was entitled to rely on the Regional Director's letter, since 29 U.S.C. 259(a) and (b) read together permit reliance only on a writing of the Administrator of the Wage and Hour Division of the Department of Labor in circumstances such as those here.

Petitioner urges in this Court the same contentions considered and correctly decided by the court below. None merits further review.

1. Petitioner's claim that the district court's findings of fact were inadequate is without substance. There is no conflict among the circuits, and citations to cases in other circuits in which the findings of fact were adequate or inadequate do not establish such a conflict. There is certainly no " 'exceptional showing of error' " warranting this Court's review of

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[2] In fact, the evidence showed that as of May 1, 1968, out of approximately 180 jobs in the highest pay classification, only 1 was held by a woman whereas all the 337 lower pay classification jobs were held by women (Appendix in the Court of Appeals, 332, 341-342, 598, 599).

concurrent findings of fact by two courts below. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635; *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

2. The courts below were also clearly correct in concluding that the availability of the more highly paid jobs to women when vacancies occurred did not cure past violations. Since the obligation under the Act is to give equal pay for equal work, that obligation is not satisfied by agreeing to allow some of the women to receive the higher rate of pay for the same work as vacancies occur. The decision below is in accord with all other appellate decisions which have considered this question. See, *e.g.*, *Shultz* v. *American Can Co.-Dixie Products*, 424 F.2d 356, 359 (C.A. 8), relied upon by both courts below, and *Hodgson* v. *Miller Brewing Co.*, 457 F.2d 221, 226-227 (C.A. 7). See also *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 265 (C.A. 3), certiorari denied, 398 U.S. 905; *Shultz* v. *First Victoria National Bank*, 420 F.2d 648, 658-659 (C.A. 5).

3. Petitioner's claim that the decision below erroneously interprets Section 10 of the Portal-to-Portal Act is fully refuted by the statutory terms and the legislative history, as well as by the longstanding administrative interpretation—all fully reviewed in the opinion below (Pet. App. 23-27). On this point, also, the decision below is in accord with the uniform view of all the courts of appeals which have considered the issue.[3]

[3] In addition to the decisions of the Tenth, Seventh and D.C. Circuits, cited in the opinion below (Pet. App. 26-27), there

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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is a recent decision in the Fifth Circuit, *Hodgson* v. *Royal Crown Bottling Co.*, No. 71-3005, decided August 18, 1972, not yet officially reported, as well as two more decisions in the Seventh Circuit: *King* v. *Board of Education of Chicago*, 435 F. 2d 295, certiorari denied, 402 U.S. 908; and *Sprogis* v. *United Air Lines*, 444 F. 2d 1194, certiorari denied, 404 U.S. 991.

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No. 72-187

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In the Supreme Court of the United States

OCTOBER TERM, A.D. 1972.

SQUARE D COMPANY,

Petitioner,

vs.

JAMES D. HODGSON, Secretary of Labor, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONER'S REPLY TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Respondent's memorandum makes reference on page 3 in footnote 2 to the fact that on one particular date, May 1, 1968, there was only one woman in the higher-rated machine operator and assembler jobs. Obviously, the attempt is to imply that the jobs in question were not really made available regardless of sex after March 1, 1966, as we have stated.

The reference is misleading because the situation on any one date cannot tell the story. It is what has happened

over an extended time that is significant. And in that regard, the record shows that by October 22, 1970, 37 women had worked in jobs which, prior to March 1, 1966, were restricted to men.[1]

The record further shows that for the period March, 1966, through May, 1968, there were 475 openings for the machine operator and assembler jobs which, prior to March 1, 1966, were restricted to men.[2] Because of insufficient interest on the part of the women in the plant, Petitioner had to fill 364 of these openings with new hires from outside the plant.[3] Also, for the period June, 1968, through September, 1970, there were 762 more openings for these same machine operator and assembler jobs. Again, because of insufficient interest on the part of women in the plant, Petitioner had to fill 539 of these additional openings with new hires.[4] Not only have the jobs in question been made "available" to women but, as these figures indicate, each and every woman has had literally hundreds of opportunities to obtain such a job. After March 1, 1966, no employee remained in the lower paid grades except by personal choice.

Respectfully submitted,

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[1] Appendix in the Court of Appeals, 649, 658-659.

[2] Appendix in the Court of Appeals, 592-597.

[3] Appendix in the Court of Appeals, 320-321.

[4] Appendix in the Court of Appeals, 647-648.